

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

76-2140

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-2140

GERALD COLLINS,

Appellant

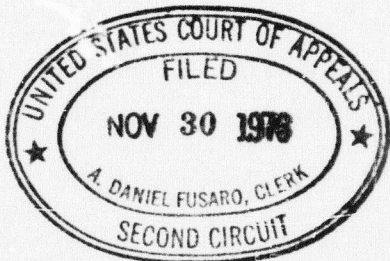
-against-

UNITED STATES OF AMERICA,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT



MARK A. LANDSMAN
Attorney for Appellant
66 Court Street
Brooklyn, New York 11201
212-875-9440

KLEINMAN & LANDSMAN
66 COURT STREET, BROOKLYN, NEW YORK 11201

INDEX

	<u>PAGE</u>
Preliminary Statement	1
Statement of the Issue	1
Statement of Facts	2
Point 1	
Appellant's right to a belated appeal should not be denied when there is some evidence that Appellant was frustrated in his appeal procedure by ineffective assistance of counsel.	3
Conclusion	6

TABLE OF CITATIONS

	<u>PAGE</u>
<u>Brewnen v. United States</u> , CA 5th, 1967;375 F2d 285	5
<u>Boruff v. United States</u> , CA 5th 1962; 310 F2d 918	4
<u>Calland v. United States</u> , CA 7th 1963, 323 F2d 405, on remand 1965, 341 F2d 44	4
<u>United States v. Bujese</u> , CA 3rd 1967, 371 F2d 120.	5

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BRIEF FOR APPELLANT

Preliminary Statement

Gerald Collins, appeals from a decision of Honorable Thomas C. Platt, United States District Judge rendered on October 8th, 1976, after a hearing, denying appellant's petition for leave to file a late notice of appeal.

Statement of the Issue

The issue in this case is whether the erroneous advice allegedly given by appellant's assigned counsel caused appellant to believe that he had no right to appeal from a sentence following a

guilty plea.

Statement of facts

Appellant Gerald Collins was indicted with others for theft of goods in interstate commerce in violation of 18 USC sec. 924 (c)(1)(2). Gerald Collins pleaded guilty to count 1 of the indictment (Use of a fire arm in the commission of a felony) during trial and was sentenced to a term of incarceration for a period of eight years to be served consecutively to a state prison term he was already serving.

The appellant then moved for permission to file a late Notice of Appeal as the statutory period for the filing of said notice had already expired. Appellant alleged in his petition (App. 2-5) that his right to appeal was frustrated by the ineffective assistance of, and erroneous advice given to him by his assigned counsel.

A hearing was held before the Honorable Thomas C. Platt, United States District Judge , Eastern District of New York on October 8th, 1976 pursuant to the Court's memorandum and order issued on August 16th, 1976 by the said judge. (App. 6-16)/

The first witness called at the hearing was the appellant, Gerald Collins. He testified that after he was sentenced on November 21st, 1975 he was returned to the courtroom holding pen and promptly told his assigned counsel to appeal the sentence. At this point

he said his assigned counsel advised him that due to plea bargaining it was impossible for him to appeal (Tr 12).

His two co-defendants, Peters and Flammia, both testified that they were present and heard this conversation. Appellant's assigned counsel, and Thomas J. O'Brien, Esq., and George Sheinberg, Esq. both testified that they were present and heard no conversation relative to an appeal.

After the hearing, Judge Platt denied petitioner's motion.

POINT 1

APPELLANT'S RIGHT TO A BELATED APPEAL SHOULD NOT BE DENIED WHEN THERE IS SOME EVIDENCE THAT APPELLANT WAS FRUSTRATED IN HIS APPEAL PROCEDURE BY INEFFECTIVE ASSISTANCE OF COUNSEL

Appellant and his co-defendants had just received what they considered a harsh sentence, and they conferred with their court-assigned counsel in the courtroom holding pen immediately following sentence.

At least six persons were present at this conference, three defendants and three lawyers. Appellant distinctly recalled being told at this conference that he had no right to appeal from a sentence imposed following a guilty plea. Regardless of whether or not there are valid grounds for such an appeal, appellant should not be denied this basic right. If there is some proof that he failed to

appeal due to erroneous advice given to him by counsel he should be afforded the "benefit of any doubt".

Although the ten day rule for filing a Notice of Appeal is still the law, there has been a relaxation under the 1966 amendments to the rules. Rule 37(a)(2) now provides that the showing of "excusable neglect" will allow the District Court to extend the time to 30 days after the expiration of the original 10 day period. Here, unfortunately the Appellant was not aware of his rights on time limits and did not apply for permission to file his Notice of Appeal until five months after sentence.

At the hearing held before Judge Platt, Appellant made out a prima facie case of ineffective assistance of counsel. The testimony of all counsel at the hearing tended to show that there may have been a misunderstanding between counsel and Appellant and that the Appellant may have understood that the motion for reduction of sentence under Rule 35 was actually an appeal.

The term "excusable neglect" in the rule is being interpreted liberally and failure of counsel to file a Notice of Appeal is one of the grounds under this rule. (Boruff v. United States, CA 5th 1962) 310 F2d 918; Calland v. United States, CA 7th 1963, 323 F. 2d 405, on remand (1965) 341 F2d 44.

What Appellant is seeking is an extension of the time

allowed under the rule, on the basis of the misunderstanding as to the appeal which was clearly evident at the hearing. Three defendants testified as to a conversation relative to an appeal and three lawyers testified that the conversation was relative to a motion under Rule 35. Under these facts Judge Platt denied the petition which was based on the ineffectiveness of counsel. (Brewnen v. United States, CA 5th 1967; 375 F2d 285; United States v. Bajese, CA 3rd 1967, 371 F2d 120). The district court judge should then have moved to the question of a misunderstanding between the lawyers and the defendants, with the lawyers using technical language relative to procedural rule and the same language being interpreted by the defendants as referring to an appeal. The benefit of doubt as to a misunderstanding between the parties should have been resolved in favor of Appellant, and the petition should have been granted.

CONCLUSION

THE DECISION OF THE DISTRICT COURT SHOULD BE
REVERSED.

Respectfully submitted,

MARK A. LANDSMAN
Attorney for Appellant
66 Court Street
Brooklyn, New York 11201
212-875-9440